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No. 95-1547

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,

Petitioner,

—v.—

USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner American Premier Underwriters, Inc. ("Penn Central") submits this reply in further support of its request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 12, 1995.[1]

[1] Penn Central has included the listing required by Supreme Court Rule 29.6 in its Petition for a Writ of Certiorari, dated March 25, 1996, at Appendix A.

I. RESPONDENTS ERRONEOUSLY ASSERT THAT THE PETITION PRESENTS A QUESTION OF LIMITED APPLICATION.

Respondents mischaracterize the petition as presenting solely an issue of interpretation of the "rarely applicable" former Bankruptcy Act, and therefore a question of relative unimportance. *See* Opp. Br. at 2. To the contrary, this petition presents a sharp and well-defined conflict in the circuits that has caused federal courts to apply non-uniform and disparate tests for determining when a claim arises in any bankruptcy, regardless of whether the case is under the Act or the newer Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"). In this case, for example, respondents' $600 million claim would have been barred by at least the Fourth, Seventh and Ninth Circuits. *See* Petition at 14-15. The Third Circuit, however, permitted the claim to proceed because it defines the existence of a claim differently, applying a non-bankruptcy law accrual standard instead of bankruptcy principles. As the Court below stated:

> We look to nonbankruptcy law to determine when these claims accrued.

71 F.3d 1113, 1114 (3d Cir. 1995).

Contrary to respondents' contentions, the text of the Bankruptcy Act is irrelevant to the Third Circuit's accrual standard. That Court "look[s] to nonbankruptcy law" in all bankruptcy cases. The Third Circuit supported its statement of the accrual standard by citing to both a Bankruptcy Act case—*Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)—and a Code case—*In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 496 U.S. 1160 (1985).[2] The Court below also

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[2] The Third Circuit has also applied the accrual standard in other Bankruptcy Act and Code cases, without drawing any distinction based upon which bankruptcy statute applied. *Compare In re Penn Central Transp. Co. (Paoli Yard)*, 944 F.2d 164 (3d Cir. 1991) (look to federal

expressly rejected the argument (made by petitioner) that there was any difference between the statutes relevant to the issue of when a claim arises:

> [The distinction urged by Penn Central to avoid application of the Third Circuit's accrual standard from *Frenville*] is a distinction without a difference. . . . Penn Central [cannot] explain how these two definitions differ and why that difference should lead us to a different result here than in *Frenville* [a Code case].

71 F.3d at 1117. Accordingly, the principle at issue on this petition is not limited to cases under the Bankruptcy Act; it has broad application to all bankruptcy cases.

II. RESPONDENTS DISTINGUISH CASES FROM OTHER CIRCUITS THAT ARE IN DIRECT CONFLICT WITH THIS CASE ONLY BY OVERLOOKING THE FUNDAMENTAL PREMISE OF THE THIRD CIRCUIT'S DECISION.

The starting and ending point of the decision below was the Third Circuit's non-bankruptcy law accrual standard. The Court found—and it was undisputed—that "[t]he predicate conduct of [respondents'] antitrust liability began before Penn Central filed its bankruptcy petition." 71 F.3d at 1114. Nevertheless, the Court ruled that respondents' claims had not accrued until years after consummation of the bankruptcy based upon its "look to nonbankruptcy law"—in this case, contribution and indemnification principles under Ohio law. As the Court stated: "That conclusion frames the issue that . . . is now before us . . . ." 71 F.3d at 1115. In effect, there was no issue left to decide after the determination that

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environmental statute to determine when a claim accrued under the former Bankruptcy Act), *cert. denied*, 503 U.S. 906 (1992) *with In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988) (look to federal Contract Dispute Act to determine when a claim accrued under the Bankruptcy Code).

respondents' claims had not accrued prior to the bankruptcy discharge.

By ignoring the legal principle that was the linchpin of the decision below, namely the accrual standard, and by claiming that each court's decision was fact bound, respondents argue that the cases cited in the petition do not conflict with the Third Circuit. In fact they do. Other circuits have explicitly criticized the Third Circuit's "look to nonbankruptcy law" to define a claim and have rejected it in favor of a broader, plainly different standard. *See, e.g., Butler v. NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995) (explicitly declining to follow *Frenville*'s state law analysis and holding that "to determine when a claim arises for bankruptcy purposes, *reference is to be made to federal bankruptcy law rather than to state law*") (emphasis added); *In re Jensen*, 995 F.2d 925, 930 n.5 (9th Cir. 1993) (rejecting the Third Circuit's "right of payment theory" and noting commentators' "direct" criticism of that standard: " '*The determination of when a claim arises for purposes of bankruptcy law should be a matter of federal bankruptcy law and should not be governed by the particular state or nonCode federal law giving rise to the claim.*' ") (quoting Arlene E. Mirsky, et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Law. 623, 651 (1991)) (emphasis added); *Epstein v. Official Comm. of Unsecured Creditors*, 58 F.3d 1573, 1576 n.2 (11th Cir. 1995) (noting that a "majority of courts" have rejected the Third Circuit's "accrued state law claim theory" and stating "*[w]e agree with these courts and decline to employ the state law claim theory*") (emphasis added) (citations omitted).

III. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE ACCRUAL STANDARD TO ENSURE A UNIFORM APPLICATION OF BANKRUPTCY PRINCIPLES.

The plainly divergent approaches by different courts for measuring the accrual of a bankruptcy claim can produce

inconsistent results on similar facts. *See* Petition at 14-15. The conflict also encourages forum shopping. *See, e.g., In re Chateaugay Corp.*, 1996 WL 117565, at *8 (S.D.N.Y. March 18, 1996) ("LTV contends that the defendants seek to withdraw the reference so that they can transfer the case to Pennsylvania where they will bask in the Third Circuit's creditor-friendly, narrow definition of a bankruptcy 'claim,' *see* [*In re M. Frenville Co.*] (holding that a bankruptcy claim does not arise until a right of action matures under applicable non-bankruptcy law), or at least dodge the Second Circuit's debtor-protective, expansive definition of 'claim'. . . .").

As evident from *Chateaugay*, the conflict in the circuits over when a bankruptcy claim arises is so clear and significant that debtors and creditors fighting over much smaller claims than those in this case will devote considerable resources to maneuver the case from one jurisdiction to another. The Court should resolve this conflict by articulating a single standard for determining when a claim arises in bankruptcy cases in order to prevent wasteful litigation and to ensure uniformity in such important determinations as which claims may be resolved in bankruptcy reorganizations, which claims are stayed from being asserted outside the bankruptcy proceedings and which claims are discharged.

Dated: May 3, 1996
New York, New York

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